No. 672 and 673.

12908

EVENING POST JOB PRINTING HOUSE, NEW YORK.

By. of Burlingham & Ivey for Respondents

Office Sup
MAY
JAMES H. McKENNEY, Clerk.

Filed May 28, 1900.

Supreme Court of the United States.

The Steamship "STYRIA," Antonio G. Scopinich,
Claimant-Appellant-Petitioner,

against

JAMES L. MORGAN *et al.*,
Libellants-Appellants.

672.

THE SAME,
Petitioner,

against

JOHN MUNROE *et al.*,
Libellants-Appellants.

674.

BRIEF FOR LIBELLANTS IN OPPOSITION TO PETITION OF "STYRIA" FOR CERTIORARI.

The principal question raised on this application is as to the amount of damages The original libels were filed against the *Styria* for failure to deliver to the libellants in New York a quantity of sulphur shipped in Sicily in April, 1898. War having been declared between Spain and the United States and sulphur being included in articles of contraband, the master discharged the sulphur at the port of shipment, and on May 8th sailed for New York, leaving the sulphur in store in Sicily.

Two days before the *Styria* sailed, as the result of negotiations between the Italian and Spanish Governments, it was officially announced that sulphur would be treated as free from capture.

Both the lower Courts held that the master was not justified in leaving the sulphur in Sicily, the learned District Judge, the Honorable Addison Brown, holding that the "commencement of the discharge on the 27th (April) was too hasty and precipitate" (Record, fol. 945), and the Court of Appeals holding that, although the master did right in discharging the cargo, it was his duty to reload it on learning that it was to be treated as free. The District Court gave decrees against the *Styria* in favor of the libellants for their damages and dismissed the cross-libels brought by the owner of the steamer for the expense of discharging and storing the sulphur. The Circuit Court of Appeals also decreed for the libellants, but allowed the ship to recover the proper expenses of discharging and reshipping at Port Empedocle.

While the lower courts found the ship liable for failure to bring the cargo forward, they differed on the question of damages. The original libels were filed in June, 1898. On August 12, 1898, the parties by their proctors entered into a stipulation under which the goods were brought forward to New York by another steamer "without prejudice to the pending suits," delivered to the libellants in New York, and sold at current market rates, the proceeds to be credited on the damages, if any, and the ship to have a lien on the goods for the expense of discharging, storing and reloading in Sicily.

I.—THE PETITIONER IS NOT AGGRIEVED BY THE RULINGS OF THE CIRCUIT COURT OF APPEALS ON THE EXCEPTIONS OF THE BILL OF LADING.

The exceptions relied on by the petitioner are—

(*a.*) "Restraints of princes."

(*b.*) The clause giving the master the right to land and store the goods at the risk and expense of the shippers in

case of blockade of the port of *discharge*, or if he shall "consider it unsafe for any reason to enter or discharge cargo *there*."

(*c*.) The clause giving the master the right to transship.

(*a*.) The Circuit Court of Appeals sustained the contention of the petitioner as to this clause, saying:

"We find in clause (*a*) abundant authority for a refusal to carry forward the sulphur while such a condition of affairs existed as that already described as being generally known to exist when the discharge began on April 27th" (Record, p. 342).

(*b*.) The clause giving the master the option of landing the goods in case of blockade or interdict of the port of *discharge*, of course, has no application to the circumstances of this case. The District Court so held, and the Circuit Court of Appeals stated that they did not find it necessary to discuss this branch of the case for the reason that they thought the master had the right to discharge the sulphur under the exception of "restraints of princes."

(*c*.) The clause giving the master the right to transship has never been under discussion and calls for no judicial interpretation in this Court.

Although the circumstances of these cases, connected as they are with the recent war, are not without a certain interest, no legal question of importance is involved in them. On the merits the main difference betwen the District Court and the Circuit Court of Appeals was as to whether the shipowner was entitled to recover the expenses of discharging and reloading the sulphur, and the decision of the Appellate Court on this point was in favor of the petitioner.

II.—THE PRINCIPAL QUESTION IN THE CASES IS ONE OF DAMAGES.

The Circuit Court of Appeals said:

"The measure of damages in such cases is well settled; the loss is the difference between the price the goods ac-

tually brought and the price they would have brought had they been sold on the day when they should have arrived. The only remaining question in the case is whether this method of calculation is modified by the express terms of the contract."

Record, p. 349.

The clause of the bill of lading referred to provides that the shipowner shall not be liable "in any case for more than the invoice or declared value of the goods whichever shall be the least."

The District Court erroneously held that this clause made the invoice value "the basis of settlement of any loss or damage" (Record, fol. 1177).

The Circuit Court of Appeals held that the clause merely "fixes a final limit of liability beyond which he (the shipowner) shall not be required to respond; it does not profess to regulate the calculation by which a loss is to be ascertained, if such loss is less than the limit."

We submit that the Circuit Court of Appeals was correct in its interpretation of the invoice value clause and gave full effect to the clause. To give the words such a meaning as was given to them by the District Court "would seem to be to substitute for the contract the parties have made another and different one, which they might easily have made for themselves, had they wished to do so" (Opinion of Circuit Court of Appeals, p. 350).

As to the stipulation, the petitioner has already had a full reargument before the Circuit Court of Appeals on the meaning of this agreement entered into between the respective proctors. It is not a matter worthy of the consideration of this tribunal. The brief opinion of the Circuit Court of Appeals on the reargument shows clearly the absurdity of the claimant's interpretation of the stipulation.

Record, pp. 363-4.

We respectfully submit that these cases are not of sufficient importance to justify the issuance of the writ of *certiorari*, which will necessarily delay the final determination of these causes for another year.

As was said in the case of Forsyth v. Hammond (166 U. S., 506):

"While this power (in *certiorari*) is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

CHARLES C. BURLINGHAM,
Advocate for Morgan.

MELVILLE H. REGENSBURGER,
Advocate for Munroe.